PUBLIC POLICY RECOMMENDATIONS

The quest for excellence into the twenty-first century begins in the schoolroom, but we must go next to the workplace. More than 20 million new jobs will be created before the new century unfolds and by then our economy should be able to provide a job for everyone who wants to work. We must enable our workers to adapt to the rapidly changing nature of the workforce.

--President Ronald Reagan, State of the Union Address,
January 27, 1987.

Introduction

The nature of work in the United States today has changed dramatically from 50, 20, 10, or even a single year ago. This change not only continues, it operates exponentially, catapulting us forward so rapidly that it has created uncertainty among many workers.

Ahead is the potential for a workplace environment advantageous to everyone who wants to work. The evidence suggests that the possibility for prosperity is unlimited for those Americans who desire to take advantage of a growing shortage of highly skilled workers. One major variable for the future work environment is the quality of our workplace laws. The challenge: whether these laws can be strengthened to provide necessary support for workers. Congressional action in the next several years could affect this outcome dramatically.

When Franklin D. Roosevelt took office in March 1933, the economy in the United States was in serious trouble. The period preceding the inauguration of the new president had been one in which unemployment had risen from around four percent of the working population to nearly 25 percent. There were some 13 million people in the U.S. without work.

This was an economy in which farm income had fallen by one-half and the value of stocks and bonds had dropped 75 percent. In 1932 alone, nearly 32 million businesses failed and went into bankruptcy. It was an era in which the Nation's Gross National Product had fallen by 44 percent in the three years preceding 1932. In total, over 5,000 banks around the nation had closed and some 80 percent of American families were left without any savings.[1]

In contrast, on October 29, 1998, Dr. Edward Montgomery, chief economist at the United States Department of Labor, stated that “the American economy is in better health than it has been in two decades. More than 13 million new jobs have been created since 1993, and unemployment is below five percent, yet inflation remains low. Real median weekly earnings for women are rising, and the Bureau of Labor Statistics reports that 80 percent of the job growth between 1989 and 1995 occurred in industries and occupations paying above the median wage.”

The social conditions of today sharply contrast the conditions of the times during which many of our workplace laws were crafted. At issue is how these contrasts can be addressed -- how the core values of these laws can be identified and separated from purposes that were tailored to meet the time but may no longer be necessary.

Making America the Most Effective Work Environment in the World: Ten Priorities

1. Wage and Hour Standards: the Fair Labor Standards Act

Enacted in 1938, the Fair Labor Standards Act (FLSA) intended to force employers to add more employees to their payrolls and reduce the intolerable rate of unemployment.[2] The FLSA established mandatory overtime at premium rates of pay for work over a certain number of hours and made distinctions between exempt and non-exempt employees. Congress assumed that employers would hire additional workers rather than pay existing hourly workers premium overtime rates in addition to their normal work rates.[3]

In today's work environment, the balancing act between family and work is already strained to the point where policy-makers are being petitioned for assistance. For example, Congress passed the Family and Medical Leave Act in the early 90's, which allowed the use of intermittent leave without pay. Yet, under the Fair Labor Standards Act, accruing "compensatory time" – paid leave accrued at time-and-a-half -- that could be used for family demand is prohibited.

Also in today's labor market, most employers compensate full-time employees with a range of benefits in addition to their basic rate of pay, regardless of overtime work. Many employers find it more cost effective to pay overtime premiums to existing full-time employees rather than to add new full-time workers. Ironically, these costs not only discourage the FLSA's goal of hiring new employees, but actually provide an incentive for employers to demand overtime from workers.

POLICY RECOMMENDATIONS:

Congress should pass legislation to add flexibility and to update the exempt and non-exempt "tests" and antiquated distinctions that influence the administration of the Act.

Congress should enact "comp time" legislation or seek regulatory flexibility that gives employees additional options to manage their time.

Congress should also continue persistent oversight into the enforcement techniques at the Department of Labor. The American Worker Project believes that there is a strong correlation between wage and hour violations and industries under competitive attack. Enforcement efforts must ensure that employers under stress do not level the playing field by exploiting workers.

2. Labor Practices under the National Labor Relations Act and Related Laws

Enacted in 1935, the Wagner Act, or the National Labor Relations Act ("NLRA") declared the public policy of the United States as "encouraging the practice and procedure of collective bargaining."[4] The purpose was to overcome an inequity in bargaining power between employers and employees and to provide a voice to workers to participate in the decisions that affected their lives.[5]

Today, many question whether the current system of labor-management laws, based on this early-1930's model, accomplishes this important purpose. Professor Thomas Kochran, Co-Director, Institute for Work and Employment Research, Massachusetts Institute of Technology, argues that the difference rests in the most fundamental expectations of individual workers and their employers. In 1935, workers accepted the "collective" model as a means to voice their goals. Today, "workers want to participate directly in the decisions that affect their immediate and long-term economic interests."[6] At the same time traditional lines between management and rank and file have become increasingly blurred, with employers directly soliciting employee ideas.[7]

Earlier in this report the definition of the term "labor organization" was discussed in terms of its consequences on the emerging "teaming" efforts across industries in the U.S. Rather than a 1930's variety of efforts to thwart the formation of unions through the creation of a "sham" worker organization, the implementation of "teaming" across U.S. industry stems from a positive lesson learned from our global competitors. This lesson is that each member of management and labor must work together, as a "team" to garner the best thinking on workplace issues, if the U.S. is to excel in the global marketplace.

POLICY RECOMMENDATIONS:

Congress should pass the Team Act or similar legislation that facilitates the growth of innovative and cooperative labor-management practices.

Congress should evaluate regulations and definitions applicable to the NLRA and related laws.

In response to documented financial irregularities by labor unions in the 1950s, Congress passed the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959. The LMRDA instituted a system of annual financial reports that requires labor unions to disclose financial data, including assets and liabilities, loans, and salary and expense payments to union officers and employees. These reports, known as LM Forms, were intended to allow rank-and-file union members and the Department of Labor to monitor unions for inappropriate transactions and mismanagement. Unfortunately, the LM-2 Form, which the Department requires of the nation's largest private-sector labor organizations, does not demand sufficient detail in several key areas. In fact, the Department of Labor currently has no specific criteria in place to guide officials on what information is adequate.

Many of the LM-2 Form's deficiencies relate to certain expenses and benefits provided to union officers and employees; in most cases, the exact nature and level of these benefits are not adequately disclosed. For example, at the International Brotherhood of Teamsters, the union pays the employee portion of the FICA payroll tax on behalf of its Washington, DC headquarters staff. The LM-2 Form, however, only discloses an employee's gross salary, with no mention of the fact that the union bears a tax burden that employees typically pay. The union's rank-and-file, therefore, pay their own payroll taxes in addition to over $1.5 million in payroll taxes for Teamsters officials and employees.

Further, the current version of the LM-2 makes it impossible to discern the costs of travel by any union officer. The form requires direct reimbursements for travel costs to be itemized by officer (or employee). On the other hand, travel expenses accumulated by union officers that the union directly pays for, such as through a union credit card, are not listed by employee; instead, the form merely directs the union to list the total amount of other travel expenses. Thus, the LM-2 Form may only include one-quarter, or even one-tenth, of an employee's actual travel expenses.

Over the past several years, many unions have created "organizing funds" to campaign for new members; some unions have separate "strike funds" that pay benefits to members who are on strike, locked out, or laid off. The LM-2 Form, however, requires unions to report all of their distinct funds in the aggregate. Consequently, LM-2 Forms do not disclose to union members the amount their leaders have set aside for specific objectives, such as organizing or paying strike benefits. In addition, many of the categories in which a union must disclose its expenditures are overly broad. For example, the Teamsters reported over $17 million in "Office and Administrative Expenses" in 1996.

The LM-2 Form creates a burden for the unions by mandating the use of two distinct and mutually exclusive sets of accounting rules. To make matters worse, if a union member asks for more information than provided in these reports, but the union is not forthcoming with the data, the member must file suit in federal court and prove "just cause" for wanting to review the union's financial records. This strict standard undermines the LMRDA's intent for union members to serve as financial watchdogs.

POLICY RECOMMENDATION:

Congress should evaluate the information obtained under the Labor-Management Reporting and Disclosure Act and update these requirements.

Congress should determine whether the regulations and practices in place at the Department of Labor and the Office of Labor-Management Standards provide for informative, accurate, timely, efficient, and complete financial disclosure on LM forms.

Despite the broad intent of the LMRDA to ensure basic standards of democracy and fiscal responsibility in American labor organizations, public employee unions were exempted from its provisions. Although the Civil Service Reform Act of 1978 (CSRA) established parallel election and financial disclosure standards for federal employee unions, the federal employees do not have the right to sue their unions to enforce their interests. When the LMRDA was passed in 1959, public employee unions were a small component of the American labor movement. Today, however, public unions represent over 40 percent of all union workers in this country.

POLICY RECOMMENDATION:

Congress should reevaluate the scope of the LMRDA to determine whether the public employee unions should be exempt from the Act.

The American Worker Project reviewed the Department of Labor's investigation of the January, 1997 elections in District 751 of the International Association of Machinists and Aerospace Workers. Despite the fact that their investigators found serious LMRDA violations, and despite the extremely narrow margin of victory, the Department of Labor's Washington decision-makers concluded that there was "no probable cause to believe" that these violations "may have affected the outcome of" the election.

POLICY RECOMMENDATION:

Congress should examine the enforcement of election laws by the office of labor-management standards to determine if there are patterns of favoritism.

For most unions, the use of "secondary boycotts" is considered an "unfair labor practice" because they result in an unreasonable restraint on free trade. A union cannot legally bring a neutral party into its dispute with an employer through the use of a "boycott" except for two industries: the construction industry and the garment industry.

While the justification for this exemption for a construction union remains subject to debate, it is far less clear why garment industry unions were exempt, and totally unclear why the garment unions total exemption has not been reviewed since 1959. Additionally, American Worker Project research has documented troubling allegations of abuse of this exception.

POLICY RECOMMENDATION:

Congress should evaluate the Garment Industry Proviso (NLRA, Section 8(e)) to determine whether it is effective in eradicating sweatshops.

3. Inflexible Government Mandates

Industries are increasingly asking federal policy-makers to replace inflexible policies with those, which allow more cooperative relationships. For example, three major pieces of legislation which are often contradictory are the Americans with Disabilities Act, the Family Medical Leave Act and Worker's Compensation. Under the ADA, an employer may not ask about the health condition of an employee, while the Family Medical Leave Act requires it. Meeting the requirements of one could result in violating the requirements of the other. Violation of either Act could result in a lawsuit or regulatory action.

POLICY RECOMMENDATION:

Congress should pass legislation to safeguard those employers who find that compliance with one law places them in violation of another.

The area of safety and health serves as an example of this need to bring flexibility to the federal regulatory process. Numerous bills have been introduced in both the House and Senate, all of which seek to move the Occupational Safety and Health Administration (OSHA) away from its traditional emphasis on inspection and citation and to a resource for training, consultation and technical assistance.[8] OSHA has traditionally resisted such efforts, pointing to the language of OSH Act mandating that "the Secretary . . . *shall* with reasonable promptness issue a citation" In recent years, OSHA has shown a willingness to ignore the must-cite mandate, while at the same time resisting Congressional attempts to introduce more flexible language into law.

POLICY RECOMMENDATIONS:

Congress should conduct hearings on the "must-cite" language in Section 9(a) of the Occupational Safety and Health Act. Based on the information obtained, Congress should then develop language that will clearly enable cooperation between OSHA and regulated industries.

4. Barriers to Employment Opportunities

A core purpose of the employment laws in the United States is to ensure that all individuals are afforded an equal opportunity for employment.[9] One such law is the Americans with Disabilities Act (ADA) which aimed to assure "equality of opportunity, full participation, independent living, and economic self-sufficiency." Studies done to date have not shown a significant percentage of Americans with disabilities entering the workforce since the ADA became effective, even though the same studies show that a significant majority of these people would prefer to be working. This can be explained, at least in part, by the "black holes of dependency" generated by America's traditional disability policy. Legislation proposed during

the 105th Congress would have extended Medicare coverage for people leaving the SSDI program to join the workforce and would have given SSDI/SSI participants a choice of providers to assist them in finding employment. By beginning to remove the current legislative barriers to employment, these bills would certainly promote the goals of the ADA. In all probability, these reforms would also save money, since working people should require less in public services.

POLICY RECOMMENDATIONS:

Congress should remove current legislative barriers to employment in an effort to more directly support the goals of the ADA. An immediate way to begin this process would be for the Congress to once again pass the "Ticket to Work and Self-sufficiency" Act.

Congress should also pursue similar efforts to identify and remove the barriers to the success of other employment laws.

5. Fiscal Management and Integrity Issues

The American Worker Project experienced an unexpected reluctance or inability on the part of the Department of Labor to share information about how it expends funds. The problem seemed to stem from the many incompatible reporting systems used at the Department of Labor to track expenditures. As a result of the different, and sometimes conflicting reporting systems, it is virtually impossible for the public and the Congress to monitor these expenditures.

POLICY RECOMMENDATIONS:

Congress should begin the development of uniform reporting systems across government so that any taxpayer can quickly obtain reliable information on how agencies are spending tax dollars.

Department of Labor should modernize and consolidate its 141 computer systems.

The Employment and Training Administration has awarded most of its appropriations in the form of noncompetitive, discretionary grants to the same organizations for more than 15 years, and it does not require that the names of principal persons funded by the grants be specified. At the same time, the Procurement Review Board has stated that continual, long term, sole-source relationships with the same organization are inconsistent with the Department's competition policy.

POLICY RECOMMENDATIONS:

Congress should require competition in grant making.

Department of Labor should maintain a reference list to cross-check for possible conflicts of interest among grantees and the Department.

Congress should comprehensively reevaluate the exceptions for award of sole-source contracts over competitive awarding and act to prevent possible abuse.

The Department of Labor has failed to provide justification for awarding sole-source contracts to the eight labor unions and one business organization that provide Job Corps training. The American Worker Project suggests the elimination of sole-source contracts in favor of competitive awarding.

POLICY RECOMMENDATION:

Congress must reevaluate non-discretionary grant award procedures.

The Department of Labor chooses to fund the Senior Community Service Employment Program (SCSEP) national sponsors with noncompetitive grants. In doing so, the Department sidesteps their own procedures requiring noncompetitive grants over $25,000 to be reviewed and approved by the Procurement Review Board. Grant awards to national sponsors are used to maintain their 1978 level of activity, which is known as the hold-harmless provision. GAO has concluded that the Department could more equitably distribute SCSEP funds if the hold-harmless provision were amended or eliminated.

POLICY RECOMMENDATION:

Congress should reevaluate the Department of Labor's policy on exemption of these grants from competition and act to prevent possible abuse.

6. Procedural Safeguards for Individuals in their Dealing with Government

The purpose of the Administrative Procedure Act (APA) is to provide the public with due process; however, the Department of Labor has apparently attempted to circumvent this process. One example of this was the Occupational Safety and Health Administration (OSHA) establishment of the Cooperative Compliance Programs (CCP). After a legal challenge, the courts struck down this program, finding that it should have been subjected to formal rulemaking under the APA.

POLICY RECOMMENDATIONS:

Congress should not permit any agency's regulatory agenda to circumvent the requirements of the APA.

Congress should reevaluate the APA as a whole, and update appropriate protections, to reinforce an individual's right to fully participate in government.

Another Department of Labor program instituted without APA notice and comment rulemaking was the fashion "Trendsetter List." Intended to recognize participants in a program to help curb labor abuses, the list served to coerce certain conduct from business.

POLICY RECOMMENDATIONS:

Congress should work with the U.S. Department of Labor to achieve the objectives of the "Trendsetters" program, which was an essential part of the Department's submission under the "Results Act," and to eliminate the program's flaws.

Congress should conduct hearings into the government's use of adverse publicity against regulated parties.

Congress should consider legislation that imposes specific criteria for the use of adverse publicity against a regulated entity.

7. Innovative Techniques to Optimize the Benefits of Government

In a time of decreasing resources, the government must find ways to leverage its resources for maximum impact. One innovative approach is the apparel industry's use of a "formal cooperative agreement" with the federal government.[10] Such self-regulation allows the government to direct its limited resources to those areas in which manufacturers have not instituted self-monitoring, while it retains the option of a random enforcement check at any time. Efforts such as these in other industries could strengthen this nation's enforcement of the law and better protect our workers.

POLICY RECOMMENDATIONS:

Congress should monitor the progress of the independent monitoring programs and conduct hearings on pilot programs. If these programs prove successful, Congress should consider codification into law.

While the law allows independent monitoring, Congress should go further and sanction the use of audited self-regulation through independently monitored programs in other industries.

8. Incentives for Worker Training and Education

Without an available pool of skilled workers to fill the jobs, and without a workforce that is constantly increasing its skills and abilities, the U.S. will lose its competitive advantage to overseas competitors. Although Congress raised the cap on H-1B Visas, that is only a short-term solution to filling high-tech jobs. The skill level of American workers must increase through better education and training. All levels of government should do everything possible to encourage both employer and individual initiatives in life-long learning. Such assistance could include tax incentives for training, simplification of existing laws, and the creation of flexible laws that encourage innovations in employee training. Additionally, the American workforce must have better and equal access to high-quality training programs, such as those under the apprenticeship system.

POLICY RECOMMENDATIONS:

Federal and state regulators should change policies in order to encourage progressive training programs and make it easier for both new and current workers to take advantage of training opportunities. Policies should not discriminate between business-provided training and individually-provided training.

Congress should fully review the National Apprenticeship Act of 1937 ("Fitzgerald Act") to make this system more fair and accountable.

Congress should continue to pass legislation like the Work Force Investment Act and continue to evaluate, and when necessary, reform the nation's job training programs when they are not cost-effective or results-oriented.

9. Incentives for Worker-Friendly Labor Conditions

Congress should promote workplace incentives that *encourage* family-friendly practices. Congress should also consider tax incentives for *employers* to create family-friendly workplaces with flexible hours, part-time work with benefits, job sharing, and home-based work opportunities. In addition, Congress should support tax deductions for employee education expenses.

By 2002, some estimates are that more than 54 million employees in the United States will be involved in some type of remote work in private sector employment. Despite the establishment goals by the Clinton Administration for the use of flexiplace work arrangements, very little information has been gathered about the benefits and/or negative products of these arrangements. As a result of independent research, the project finds that employers could achieve significant cost reductions through the use of these work arrangements. Little is known, however, about the offsets to these cost reductions that may be encountered by numerous managerial and legal problems.

POLICY RECOMMENDATIONS:

The Education and the Workforce Committee held hearings on the use of telecommuting arrangements in the private sector. These hearings should be followed by a comprehensive assessment of the legal obstacles encountered by employers who seek to use these work arrangements to improve their productivity and better serve their employees. If necessary, appropriate legislation should be drafted to facilitate these work arrangements.

Congress should insist that the federal government proceed with the feasibility study on telecommuting and flexible work arrangements in the federal sector that was begun over a decade ago. Congress should establish a completion date for publishing this study and making it available to the public.

10. Workers' Security in Pension and Retirement Systems

In the midst of an ever-changing work environment, many workers fear being "left behind" by change. Many workers fear that the standard of living they have known during their working years will decline when they retire or are forced to leave the workforce for whatever reason. Additionally, many workers fear that the death of their spouse will leave them unable to meet financial obligations. Because of these fears, policy-makers must turn their attention to the future of pension and retirement law. While any recommendations for change will certainly bring controversy, the workers in this nation need an open and frank discussion of the legal framework surrounding economic retirement security. The American worker needs flexible and neutral laws that will allow benefits to be tied to either the employer or the employee.

POLICY RECOMMENDATIONS:

Federal Laws should be flexible and neutral in allowing benefits to be tied to either the employer or the employee.

Congress should focus on the necessity for workplace and tax laws to meet the needs of the modern workplace in which employees may change jobs a number of times during their working life.

Congress should investigate providing a legal option for employees to carry vested benefits from job to job for the duration of their career.

Conclusion

The 21st century American workplace is radically different from the workplace of the 1930s and 1940s. Many of the laws created during that era do not fit the needs today. Although many workers and industries continue to exemplify the spirit of American innovation, they are too often succeeding in spite of law, and not because of it. With technological change occurring at an almost overwhelming pace, with increasing global competition, with a decreasing number of skilled workers, American workplace law must change. This is vital to make America the most effective work environment in the world. This is vital for our survival.

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[1] See "To Pay or Not to Pay: Modernizing the Overtime Provisions of the Fair Labor Standards Act," N. Abbott, University of Pennsylvania Journal of Labor and Employment Law, Spring 1998.
[2] Id.
[3] Id.
[4] National Labor relations Act of 1935, 29 U.S.C. §§151-169
[5] Id.
[6] "Labor Policy for the Twenty-First Century," Thomas A. Kochran, University of Pennsylvania Journal of Labor and Employment Law, Spring 1998.
[7] Id.
[8] See for instance Public Law No: 105-197, which codifies OSHA's long-standing state-run consultation programs, or Public Law No: 105-198, which prohibits OSHA from establishing any performance measures for OSHA employees based upon the number of inspections conducted, number of citations issued, or amount of penalties assessed.
[9] See generally, 42 U.S.C.A. §2000e-2 and 3.
[10] See testimony of Larry K. Martin, President, American Apparel Manufacturing Association, before the House Committee on Education and the Workforce, Subcommittee on Oversight and Investigations, September 25, 1998.